IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 153 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HITENBHAI H DAVE

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 153 of 2003

MR PJ KANABAR for Petitioner No. 1

MS PB SHETH APP for Respondent No. 1

MR JAGDISH H MEHTA for Respondent No. 2

MR PRASHANT MANKAD for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 12/09/2003

ORAL JUDGEMENT

Rule. The petitioner herein, has preferred this

revision application u/s.397 read with s.401 of the Code of Criminal Procedure, 1973 (for short, "the Code") in order to challenge an order dated 26/02/03 recorded by the learned J.M.F.C., Rajula, District Amreli, in Criminal Case No.2/2001 under which the learned Magistrate dismissed an application of the present petitioner - original accused in the said criminal case, for his discharge from the aforesaid criminal case.

2. It appears from the record that the second respondent had sold certain goods to the petitioner and the petitioner did not pay for the same. The second respondent felt that the petitioner has committed criminal breach of trust and therefore, a complaint was filed, being Criminal Case No.2/2001 before the said Court. The trial court recorded verification on oath of the second respondent and directed that complaint be registered and process of summons be issued on the present petitioner.

3. Pursuant to the service of summons on the basis of the said order dated 03/01/01, the petitioner appeared before the trial court and submitted an application, Ex.13, stating that no offence is made out even prima facie and therefore, he may be discharged.

4. After hearing, the learned Magistrate dismissed the said application stating that the matter involved questions of fact and therefore, no discharge could be directed at that stage.

5. Feeling aggrieved by the said order of the trial court, the petitioner has preferred this revision application before this Court. The petitioner has contended that though no offence has been made out even prima facie, the petitioner has been wrongly involved and therefore, the order of the trial court dismissing the said application, is illegal and deserve to be set aside. The petitioner has, therefore, prayed to set aside the said order.

6. On receipt of the revision application, Notice was issued. In response to the service of notice of Rule, Ms.P B Sheth learned APP appeared on behalf of the State and Mr.Prakash Mankad learned advocate appeared on behalf of respondent no.2. I have heard the learned advocates for the parties and have perused the papers.

7. It is not much in dispute that the contesting respondent had sold the product to the petitioner on credit and the petitioner is alleged to have failed in

making payment of the value of goods sold to him. This fact is not seriously disputed. However, the case of the contesting respondent before the trial court was that the petitioner did not make payment of the goods purchased by the petitioner and therefore, he has committed an offence of criminal breach of trust. In order to appreciate the position, we have to revert to the provision made in S.405 of IPC, which may be reproduced for ready reference as follows;

Section 405 : "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"".

7. On a bare reading of the said provision, it is very clear that before an offence punishable u/s.406 IPC can be said to have been committed, there must be an allegation that the petitioner, being the original accused in the aforesaid criminal case, was entrusted with a property.

8. In the present case, we find that the petitioner was not entrusted with the salt in question, but, the said property was sold to the petitioner by the contesting respondent. In that view of the matter, it cannot be said that the petitioner was entrusted with the aforesaid goods, by the contesting respondent.

9. In support of the aforesaid contention, the learned advocate for the petitioner has relied upon a decision in the case of S.N. Palanitkar V/s. State of Bihar reported in AIR 2001 SC 2960. It has been laid down therein that when it is not shown from the record that some property was entrusted to the accused person or that the accused had domain over any property of the complainant which the accused dishonestly converted to his own use so as to satisfy the ingredients of S.405 IPC, then in that case, no offence punishable u/s.406 IPC can be said to have been made out.

10. In the present case, we find that the goods were sold and were not entrusted to the petitioner. In that view of the matter, when entrustment is not there, then,

there cannot be criminal breach of trust or criminal misappropriation, in respect of the said goods. Therefore, the petitioner is right in alleging that no offence is made out even prima facie. In that case, the trial court was not legally justified in issuing process and in registering the complaint for an offence punishable u/s.406 IPC. Ordinarily, an offence punishable u/s.420 IPC is tagged with an offence punishable u/s.406 IPC, which has not been done. In the present case, when no offence is made out, the order of the trial court registering the complaint and issuing process is ex-facie illegal and deserve to be set aside.

11. For the foregoing reasons, this application is allowed. The impugned order passed by the learned J.M.F.C., Rajula is set aside and the petitioner herein is ordered to be discharged from the offence punishable u/s.406 IPC in Criminal Case No.2/2001. Rule is made absolute.

(D. P. Buch, J.)

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